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In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, ET AL., PETITIONERS

v.

UTE INDIAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Uintah Indian Reservation in Utah was disestablished or diminished by the Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1069, which provided that some unallotted lands of the Reservation would be included in a national forest reserve and that the remaining unallotted lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States."

2. Whether the Uncompahgre Indian Reservation in Utah was disestablished by the Act of June 7, 1897, ch. 3, § 1, 30 Stat. 87, which provided that all lands of the Reservation not allotted in severalty to the Uncompahgre Ute Indians by a specified date shall "be open for location and entry under all the land laws of the United States" and which did not provide for the payment of any compensation to the Uncompahgre Indians for those lands.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Uintah Indian Reservation in northeastern Utah was established by Executive Order in 1861 (Pet. App. 292a) and confirmed by Congress in 1864 (Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63). In an agreement approved by Congress in 1880, the White River Utes ceded their interest in a reservation in Colorado and agreed to accept allotments on the Uintah Reservation. Act of June 15, 1880, ch. 223, § 1, 21 Stat. 200. In the same agreement, the Uncompahgre Utes ceded their interest in the Colorado reservation and agreed to accept allotments elsewhere (21 Stat. 200). The land selected for the Uncompahgres was in Utah, adjacent to the Uintah Reservation, and was set apart as the Uncompahgre Reservation by Executive Order in 1882 (Pet. App. 308a).

b. In 1888, with the consent of three-fourths of the Indians, Congress "restored to the public domain" a 7,040-acre triangle on the eastern edge of the Unitah Reservation that contained gilsonite mineral deposits. The land

was to be sold and the proceeds held in trust for the Tribes. Act of May 24, 1888, ch. 310, 25 Stat. 157 *et seq.*; see Pet. App. 165a-169a.

c. In 1894, Congress directed the President to appoint a commission to allot land on the Uncompahgre Reservation, after which the unallotted lands would "be restored to the public domain." Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337. The 1894 Act provided for settlers to pay $1.50 per acre for the opened land, but did *not* provide for the proceeds to be paid to the Uncompahgres (§ 21, 28 Stat. 337). The 1894 Act also directed the commission to negotiate with the Indians on the Uintah Reservation for the acceptance of allotments and "the relinquishment to the United States" of unallotted lands (§ 22, 28 Stat. 337). The differing treatment reflected the view that the Indians on the Uintah Reservation owned their lands, and that a cession agreement and compensation therefore were required to open their surplus lands to settlement by non-Indians, but that the Uncompahgres occupied their lands only temporarily, until they took allotments under the 1880 agreement (Pet. App. 170a-171a & n.89, 181a-182a, 185a-186a & nn.112, 113).

In 1897, Congress once again mandated that allotments be made to the Uncompahgres, but this time on either the Uncompahgre or Uintah Reservation, because there was not enough suitable land on the Uncompahgre Reservation alone (Pet. App. 173a, 177a-178a). Congress further stipulated that all lands on the Uncompahgre Reservation that were not allotted by April 1, 1898 shall "be open for location and entry under all the land laws of the United States." Act of June 7, 1897, ch. 3, § 1, 30 Stat. 62. Because of doubts about the legality of allotments made after that deadline (*ibid.*), Congress in the following year authorized the Secretary to approve 83 allotments "within the former Uncompahgre Indian Reservation." Act of Mar. 1, 1899, ch. 324, § 1, 30 Stat. 940-941. The Secretary later approved 584 allotments to Uncompahgres on the Uintah Reservation (Pet. App. 179a-180a).

d. In 1898, Congress directed the Secretary to appoint another commission to negotiate an agreement for allotment of Uintah Reservation lands and "cession to the United States" of unallotted lands. Act of June 4, 1898, ch. 376, §§ 1-2, 30 Stat. 429. When the Uintah and White River Utes resisted, Senator Rawlins of Utah introduced a bill that would have unilaterally reduced the size of the Reservation (Pet. App. 196a-199a). However, the diminishment bill did not pass (*id.* at 199a), and Congress instead passed an Act in 1902 that provided for the Secretary to allot lands only with the consent of the Indians, with the allotments to be made prior to October 1, 1903. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264. The Act further provided that "all the unallotted lands within said reservation shall be restored to the public domain" and that the proceeds of the sale of the land to homesteaders w uld be used for the benefit of the Indians (*ibid.*). Immediately thereafter, Congress passed an amending resolution that, "[i]n addition to the allotment in severalty," directed the Secretary to set apart grazing lands "for the use in common of the Indians of [the Uintah] reservation" (J. Res. 31, 32 Stat. 744).

e. Subsequently, Congress provided that if the Uintah and White River Utes did not give their consent by June 1, 1903, the Secretary was unilaterally to allot the amount of land specified in the 1902 Act. Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-998. When the Uintah and White River Utes once again opposed the plan for allotment and cession (Pet. App. 205a-208a), Congress extended the opening date to March 10, 1905 (Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208). Finally, in 1905, Congress extended the opening date to September 1, 1905, but specified that the unallotted lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States." Act of Mar. 3, 1905, ch. 1479, § 1, 33 Stat. 1069-1070. The 1905 Act also authorized the President, before opening the Reservation, to: (i) "set apart and reserve as an addition to the Uintah Forest Reserve * * * such portion

of the lands within the Uintah Indian Reservation as he considers necessary," and (ii) to set apart a reservoir site (33 Stat. 1070). The proceeds from the sale of timber on the forest lands prior to June 30, 1920 were to be paid to the Indians (*ibid.*).

By a series of proclamations issued in the summer of 1905, some 1,010,000 acres "in the said Uintah Indian Reservation" were added to the Uintah Forest Reserve (Pet. App. 327a); townsites "in the Uintah Indian Reservation Lands" were reserved for later disposal (*id.* at 339a); 56,000 acres "in the Uintah Indian Reservation" were withdrawn from disposal for a reservoir site (*id.* at 344a); and the remaining unallotted lands "in said reservation" were opened to settlement under the homestead laws (*id.* at 333a). See Pet. App. 222a-223a, 326a-350a.

f. In 1910, Congress authorized payment to the Uintah Indians of $1.25 per acre for the lands that had been set apart for reservoir purposes in 1905, adding that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished." Act of Apr. 4, 1910, ch. 140, § 23, 36 Stat. 285. Finally, in 1948, Congress "extended" the "exterior boundary" of the Uintah Reservation (by then known as the Uintah and Ouray Reservation) to include approximately 510,000 acres (the Hill Creek Extension) within the area of the original Uncompahgre Reservation. Act of Mar. 11, 1948, ch. 108, § 1, 62 Stat. 72. See Pet. App. 186a-190a, 272a.

2. a. Respondent Ute Indian Tribe is composed of the Uintah, Uncompahgre, and White River Bands (Pet. App. 152a). Effective September 15, 1975, the Tribe adopted a Law and Order Code, which defined the Tribe's territorial jurisdiction to be all lands within the " 'original confines of the Uintah and Ouray Reservation,' " as set forth in the Executive Orders of 1861 and 1882 and the Acts of May 27 and June 19, 1902 and March 11, 1948, except as otherwise provided by law (Pet. App. 118a n.8). The local-government petitioners opposed that territorial claim. The Tribe then filed this suit in the United States District Court for the District of Utah in October

1975, seeking a declaratory judgment that all land within the original boundaries of the Uintah and Uncompahgre Reservations—including land owned by non-Indians—is "Indian country" under 18 U.S.C. 1151.[1]

In an exhaustive opinion rendered on June 19, 1981 (Pet. App. 112a-291a), the district court held (i) that the original Uncompahgre Reservation was disestablished by Congress in 1897 (*id.* at 169a-191a); (ii) that the Uintah Reservation was not diminished when it was opened to settlement in 1905 (*id.* at 191a-245a, 258a-281a); but (iii) that the Uintah Reservation was diminished to the extent of the 1905 withdrawal of 1,010,000 acres for national forest purposes (*id.* at 245a-257a).[2]

b. A divided panel of the court of appeals ruled against the Tribe on these three issues (Pet. App. 66a-111a). However, on rehearing en banc after this Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), the court of appeals held in a 5-2 decision that neither the Uintah nor the Uncompahgre Reservation was diminished (Pet. App. 1a-62a).

DISCUSSION

The court of appeals, applying the principles of this Court's unanimous decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), correctly held that the Uintah Reservation was not diminished in 1905 by the opening of some unallotted lands to non-Indian settlement or by the inclusion of other lands in the forest reserve. That holding accords with the view of the United States, both in *Appawora* v. *Brough*, 431 U.S. 901 (1977), and in the

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[1] The term "Indian country" is defined by 18 U.S.C. 1151 to mean, inter alia, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent," and all Indian allotments (including those outside a reservation) to which Indian title has not been extinguished.

[2] The district court also held that the Gilsonite Strip and reclamation lands were separated from the Reservation (Pet. App. 165a-169a, 257a-258a). The Tribe did not appeal those rulings, and they are not at issue here.

courts below in this case, and it does not conflict with any decision of the Utah courts or present an issue of significant practical importance. Although we believe that the original Uncompahgre Reservation was disestablished in 1898, the court of appeals' contrary holding does not warrant review. The court followed the analytical framework of *Solem* v. *Bartlett*, *supra*, erring only in the particular result it reached, and, unlike in *Solem*, there is no conflict with state court decisions. Moreover, this aspect of the decision below is of little practical importance, because the land in the original Uncompahgre Reservation is largely uninhabited and is primarily owned by the United States. Review by this Court, therefore, is not warranted.

A. *General Principles.* The Uintah and Uncompahgre Reservations were opened to non-Indian settlement pursuant to surplus land Acts passed in 1905 and 1897. The Congresses that passed those Acts no doubt anticipated the eventual demise of the reservation system. But the Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, see, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and other surplus land Acts did not, see, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962)." *Solem*, 465 U.S. at 468-469. As explained in *Solem*, the Court has established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those Acts that simply permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries (*id.* at 470).

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation

status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The most probative evidence of congressional intent is the statutory language used to open the reservation. Language that explicitly refers to a "cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress meant to sever it from the reservation (*ibid.*). When such language is accompanied by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished" (*id.* at 470-471). However, cession language and unconditional compensation are not absolute prerequisites to a finding of diminishment. "When events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress so intended (*id.* at 471). "There are, of course, limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land act" (*id.* at 472). Accordingly, if the text and legislative history of the Act fail to reveal "substantial and compelling evidence of a congressional intention" to diminish, the "traditional solicitude for the Indian tribes" requires a ruling that the reservation remains intact (*ibid.*).

B. *Uintah Reservation.* Applying the foregoing principles, the court of appeals correctly found an absence of "substantial and compelling evidence of a congressional intention" to diminish the Uintah Reservation in 1905 by either (1) the opening of certain unallotted lands to non-Indian settlement, or (2) the addition of other such lands to the forest reserve.

1. a. The 1905 Act provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States" (33 Stat. 1069). This language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in unallotted lands (*Solem*, 465 U.S. at 470).

Compare *DeCoteau*, 420 U.S. at 445 (citation omitted) (finding disestablishment where the Indians did " 'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands' "); *Rosebud*, 430 U.S. at 583-584 (same). Indeed, the Act involved in *Solem*, which was held *not* to effect a diminishment, also provided for the disposition of unallotted lands under the "homestead and townsite laws" (Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461). And in *Seymour* and *Mattz*, the Court unanimously held that similar statutes did not terminate the reservation, but merely " 'open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards' " (*Mattz*, 412 U.S. at 497 (quoting *Seymour*, 368 U.S. at 356)). See also Pet. App. 218a-219a (collecting cases). It was not unreasonable for the court of appeals to give a similar construction to the 1905 Act that opened the Uintah Reservation to settlement.

b. Other features of the 1905 Act also weigh against a finding of diminishment. The Act did not provide for the payment of a sum certain by the United States, which would have suggested an intent to effect an immediate divestment of all tribal interests as a quid pro quo. *DeCoteau*, 420 U.S. at 445-446; *Rosebud*, 430 U.S. at 598 n.20. Rather, the Tribe was to receive payment for unallotted lands only if and when they were sold, and in the meantime it retained an equitable interest in them. *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920). Nor did the 1905 Act incorporate a cession agreement between the Tribe and the United States, such as those incorporated into the 1891 and 1904 Acts that were held in *DeCoteau* and *Rosebud* to have effected a disestablishment (420 U.S. at 445; 430 U.S. at 597).[3]

[3] The Court stressed in *Rosebud* that the 1907 and 1910 Acts in that case, which did not contain comparable cession language, nevertheless gained the approval of a majority of the Indians (430 U.S. at 607, 610-611) and carried forward the intent of the 1904

Although under *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), the consent of the Indians was not *required*, the "traditional solicitude for the Indian tribes" (*Solem*, 465 U.S. at 472) counsels reluctance to infer an intent to diminish where, as here, Congress was not acting in substantial compliance with consent previously given by the Indians and the Indians in fact steadfastly opposed the very concept of cession. *Rosebud*, 430 U.S. at 595 n.17, 606-607 & n.32, 610 & n.41; *Solem*, 465 U.S. at 469 n.10, 470, 471, 477 & n.21, 478. Finally, the 1905 Act contained no provisions extending liquor laws or granting school sections to the State in the opened lands, which were found to be relevant in *Rosebud*. See 430 U.S. at 599-601, 613-614 & n.47.

c. It also is significant that petitioners do not contend that the Uintah Reservation was *entirely* disestablished by the 1905 Act (see Pet. 5; Reply Br. 1 nn. 2, 3), and such a contention would be refuted in any event by subsequent administrative and legislative references to the Reservation (see Pet. 28 nn. 45, 46) and by the 1948 Act, which "define[d] the exterior boundar[ies]" of that Reservation (62 Stat. 72). Petitioners' argument instead is that the Reservation was diminished on a piecemeal basis by the opening of particular tracts to settlement, leaving only the individual allotments and tribal trust land as the remaining Reservation. See Pet. 4, 7, 21-22, 25-28. That contention is inconsistent with *Seymour*, where the Court held that the disposition of surplus lands under the homestead and town-site laws did *not* reduce the Colville Reservation to the checkerboard pattern of trust land that remained. 368 U.S. at 357-359. See also *Solem*, 465 U.S. at 470; *Mattz*, 412 U.S. at 497.

Moreover, in *DeCoteau* and *Rosebud*, the relevant statutes precisely described the areas that were found to have been removed from reservation status.[4] The find-

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Act, which did incorporate a cession agreement (430 U.S. at 605-606, 608-609, 612-613).

[4] In *DeCoteau*, the tribe ceded the entire reservation (420 U.S. at 445), and in *Rosebud*, the three Acts carved off from the reserva-

ing of diminishment in those cases therefore comported with the requirement that "*Congress* [must] clearly evince an 'intent . . . . to change . . . boundaries'" (*Solem*, 465 U.S. at 470, quoting *Rosebud*, 430 U.S. at 615 (emphasis added)). By contrast, Congress did not describe in the 1905 Act the areas of the Uintah Reservation that were to be opened to non-Indian settlement and that, in petitioners' view, were thereby removed from reservation status. Congress instead left the identification of opened lands to the Secretary, after allotment and the setting apart of unspecified lands for forest and reclamation purposes. That approach does not suggest that the 1905 Act itself formally redrew the Reservation's boundaries. On the other hand, the 1888 Act, which concededly *did* remove the Gilsonite Strip from the Uintah Reservation, precisely described the affected territory (Act of May 24, 1888, ch. 310, 25 Stat. 157 *et seq.*), and the 1910 Act, which explicitly extinguished the Indians' interest in the reservoir lands (36 Stat. 285), referred to a precise description of those lands in the Presidential Proclamation of 1905 (34 Stat. 314 (Pet. App. 343a-347a)).

d. Petitioners focus, however, not on the 1905 Act, but on the earlier 1902 Act, which contemplated that unallotted lands on the Uintah Reservation would be "restored to the public domain" (32 Stat. 264). In petitioners' view, the quoted language is "unequivocal language of disestablishment" (Pet. 14) that mandates a finding that the Uintah Reservation was diminished. See Pet. 13-21. There are two flaws in this contention.

First, in *Solem*, the Court held that statutory language indicating that the surplus lands were to be "part of the public domain" was "hardly dispositive" (465 U.S. at 475), explaining that this reference could have meant simply that the lands were opened to settlement (*id.* at 475 n.17). In so ruling, the Court specifically rejected the argument of petitioners Duschesne County and Uin-

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tion lands situated in designated counties (430 U.S. at 585, 597, 608, 613). See also *DeCoteau*, 420 U.S. at 439 & n.22 (listing agreements that removed specifically defined territory).

tah County, who were amici curiae in *Solem*, that a reference to the "public domain" has a talismanic effect that renders it unnecessary to consider other aspects of the statutory text, legislative history, and surrounding circumstances (*id.* at 475 & n.16). The court of appeals therefore did not err in repecting petitioners' identical argument in this case. See Pet. App. 5a, 11a-12a; *id.* at 17a-19a (Seymour, J., concurring). This is not to say that "public domain" language is irrelevant; in some instances, it is highly probative. See *Seymour*, 368 U.S. at 354. The court of appeals simply concluded that here, as in *Solem*, such language is not dispositive.

Second, petitioners ignore the fact that the allotment and restoration provisions of the 1902 Act on which they rely were conditioned upon the Indians' consent (32 Stat. 263-264), which was not forthcoming (Pet. App. 5a). Congress then unilaterally opened the unallotted lands pursuant to the 1905 Act, which did not carry forward the language in the 1902 Act that would have restored those lands to the "public domain." The 1905 Act instead provided that the unallotted lands were to be "disposed of under the general provisions of the homestead and town-site laws of the United States"—language that was held not to effect a disestablishment in *Solem*, *Mattz* and *Seymour*—and the decision below ultimately rests on this substitute language. See Pet. App. 5a-6a, 217a-235a.[5] Moreover, after passage of the 1902 Act upon which petitioners rely, Congress provided for the setting aside of 250,000 acres for a tribal grazing reserve (32 Stat. 744) and directed that the proceeds from timber sales on the forest lands be paid to the Ute Bands (33 Stat. 1070). This recognition of continuing tribal interests on lands other than individual allotments reinforces the conclusion that the 1905 Act did not carry

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[5] In the case of the Navajo Reservation discussed by petitioners (Pet. 12 & n.27) and amicus Santa Fe Mining (Br. 10), the operative opening statute itself specified that the land would be "restored to the public domain." Act of May 29, 1908, ch. 216, § 25, 35 Stat. 457. Here, by contrast, it is the *deletion* of such language that is significant.

forward any prior purpose to effect an immediate and complete surrender of all tribal interests throughout the Reservation. Compare *Solem*, 465 U.S. at 474.[6]

e. Petitioners also err in relying (Pet. 27-30) on some post-1905 references to the "former" Uintah Reservation. Even the dissenting judges in the court of appeals found that the references to the "current" and "former" status of the Reservation "evince[] no discernible Congressional intent one way or the other" (Pet. App. 57a-58a (Seth, J., dissenting)), and the district court reached a similar conclusion based on its thorough review of the record (*id.* at 238a-245a). Compare *Solem*, 465 U.S. at 418-419. Moreover, the references cited by petitioners were made at a time when Indian lands were typically thought to include only those in which Indians held some sort of *property* interest. "Only in 1948 did Congress uncouple reservation status from Indian ownership and statutorily define Indian country to include lands held in fee by non-Indians, within reservation boundaries." *Solem*, 465 U.S. at 468 (citing Act of June 25, 1948, ch. 645, 62 Stat. 757, 18 U.S.C. 1151). In any event, the notion that the Uintah is only a "former" Reservation is conclusively refuted by Congress's statutory confirmation of that Reservation when it added the Hill Creek Extension in 1948.

Similarly, the fact that non-Indians accepted Congress's invitation to settle on the Reservation (see Pet. 21-22) cannot accomplish a disestablishment that Congress did not enact. See, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470 (1979) (only 3,074

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[6] Contrary to petitioners' contention (Pet. 26-27), the Presidential Proclamation of July 14, 1905 that opened the Reservation to settlement did not interpret the 1905 Act to restore the land to the public domain and diminish the reservation. The reference in the Proclamation to the "public domain" was merely one part of the recitation in the preamble of the various Acts that preceded the opening. The last mentioned was the 1905 Act, which was accurately described as providing for disposal of the lands under the "homestead and town-site laws" (Pet. App. 332a). Petitioners delete that critical passage from their quotation of the Proclamation.

of the 25,000 residents of the Yakima Reservation are tribal members). Of course, where the non-Indian presence so dominates that the area has lost all Indian character, that eventuality may be some evidence of what Congress intended when it passed the opening legislation. *Solem*, 465 U.S. at 471-472, 480. But in this case, far less than a majority of the land within the Uintah Reservation has passed into private non-Indian hands. In addition, to attach significance to the pattern of settlement would carve out a non-reservation enclave in the middle of the Reservation that would be largely surrounded by land that petitioners concede has retained its reservation status.[7]

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[7] Petitioners rely (Reply Br. 2-3) on the government's brief (at 28) in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), for the proposition that the United States previously has taken the position in this Court that the Uintah Reservation consists only of the land actually held in trust by the United States. The government's brief in that case, however, did not state that the Reservation was so limited; it simply referred to certain trust property "on" the Reservation. Moreover, *Affiliated Ute* did not involve a question of the territorial scope of the Reservation, but only a dispute over property within the Reservation that was held in trust by the United States for the Tribe. See 406 U.S. at 141. The portion of the government's brief to which petitioners refer argued that the suit was barred by sovereign immunity insofar as it was brought against the United States. That discussion obviously had no relevance here. Petitioner's reliance (Pet. 8-9; Reply Br. 2) on the opinion in *Affiliated Ute* is misplaced for essentially the same reasons.

In a stipulation filed in the Court of Claims on January 4, 1954, in *Uintah & White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1 (1957), which concerned the Tribe's claim for additional compensation for certain property, the Bands and the United States stated that the Indians on the Uintah Reservation "received individual allotments thereon pursuant to the Act of May 27, 1902, as amended," and that surplus lands were "restored to the public domain" pursuant to the 1902 Act "and amendments thereto" (Stipulation at 4, 10). That stipulation carries little weight here. The quoted passages do not suggest that the 1902 Act was the sole basis for allotment and opening; to the contrary, they make clear that the substantive provisions of the 1902 Act were "amended." Similarly, the reference to the "public domain" (which does not appear

f. In sum, a number of considerations support the concurrent conclusion by the courts below that the evidence does not establish a sufficiently clear and unequivocal intent by Congress to diminish the Uintah Reservation when it was opened to non-Indian settlement in 1905. That holding does not in any event warrant review by this Court. The en banc court of appeals simply applied the general standards of *Solem* to the particular circumstances of the Uintah Reservation, and its ruling does not present a conflict with state court decisions, as there was in *Solem* (465 U.S. at 466) and *DeCoteau* (420 U.S. at 430-431). The Utah Supreme Court did render a decision almost a decade ago that seemed to assume that these lands were no longer part of the Reservation. *Brough* v. *Appawora*, 553 P.2d 934 (1976). But this Court, at the urging of the United States, vacated that decision and remanded for further consideration in light of *Rosebud* (431 U.S. 901 (1977)), and, as petitioners concede (Pet. 19 n.35), the diminishment issue was not resolved on remand. If the Utah Supreme Court never-

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in the 1905 Act) might have reflected nothing more than a recognition that the lands were opened to non-Indian settlement. See *Solem*, 465 U.S. at 475 n.17. In fact, at a later point in the chronological recitation of legislation pertaining to the Uintah Reservation, the stipulation accurately stated that the 1905 Act provided for opening of the Reservation "under the general provisions of the homestead and town-site laws" and that the 1905 Act "made other changes in the provisions of the 1902 Act for the disposal of unallotted lands" (Stipulation at 12).

The stipulation (*id.* at 15, 17, 23) also referred to the "former Uintah Reservation" when describing lands included in the National Forest or set aside for reclamation purposes. That of course was an accurate description of the reclamation lands, because the 1910 Act extinguished all tribal interests in those lands (see pages 1-2, 10, *supra*). It was not an accurate description of the forest lands. However, as with other such referneces (see page 12, *supra*), that description is inconclusive: because the question of territorial boundaries was not involved; because the distinction between ownership and territorial boundaries was not yet readily apparent (*Solem*, 465 U.S. at 468); and because the stipulation preceded this Court's modern disestablishment decisions, which commenced with *Seymour* in 1962.

theless should adhere to its prior view in some future case, notwithstanding the intervening decision in *Solem* and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review.

Furthermore, there is no reason to believe that non-Indians on the Reservation will be significantly affected by the decision below. Since 1975, when the Tribe adopted the Law and Order Code that precipitated this suit, the Court has made clear that Indian Tribes may not assert criminal jurisdiction over non-Indians (*Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)) and may assert civil jurisdiction over non-Indians on fee land only where they enter into consensual relationships with the tribe or its members or engage in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). There is no indication that this standard would permit the Tribe to exercise significant authority over non-Indians, because, as petitioners concede (Pet. 5-6, 10-11, 21-22), non-Indians live almost exclusively on fee lands that are removed from tribal concerns. Nor is there any basis for petitioners' assertion (*id.* at 10, 22) that the authority of local governments is "significantly limited" by the holding below. The reservation status of the opened area does not affect the local governments' jurisdiction over non-Indian lands or their inhabitants, and, irrespective of the decision below, those governments do not have jurisdiction over Indian lands or Indians on those lands.

2. a. The en banc court of appeals' holding that the Uintah Reservation was not diminished by the inclusion of 1,010,000 acres in the forest reserve also is consistent with *Solem*. The relevant language of the 1905 Act provided that "before the opening of the Uintah Indian Reservation, the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve * * * such portion of the lands within the Uintah Indian Reservation as he considers necessary" (33 Stat. 1070).

As the en banc majority below observed, "[n]othing in this paragraph amounts to explicit language of cession or a total surrender of Indian interests" (Pet. App. 26a (Seymour, J., concurring)). To the contrary, Congress's directive in the proviso to this section that the proceeds of timber sales from the forest lands be paid to the Indians for the ensuing 15 years (33 Stat. 1070) confirms the continued tribal interests in those lands (Pet. App. 7a), and the Indians were not actually compensated for the forest lands until much later. See Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092 *et seq.*; *Uintah & White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1 (1957). Moreover, because the addition of the lands to the forest reserve was merely an alternative to opening them to non-Indian settlement, and because the opening did not diminish the Reservation, there is no reason to construe the forest reserve provision to have effected a diminishment. It also is relevant that although Congress in 1910 explicitly extinguished all of the Indians' interests in the reclamation lands that were initially set apart pursuant to the same paragraph of the 1905 Act, it did not enact a similar statute extinguishing Indian interests in the forest reserve lands. The court of appeals therefore properly refused to construe the 1905 Act to accomplish that very result (Pet. App. 7a; *id.* at 28a (Seymour, J., concurring)).

b. It is true that the district court, unlike the court of appeals, concluded that the forest reserve lands are not part of the Uintah Reservation. But the district court did not reach that result by application of the analytical framework of this Court's disestablishment cases. Rather, the district court perceived an *inherent* inconsistency between the inclusion of the lands in a forest reserve and their continuation as part of an Indian Reservation (Pet. App. 250a). However, it is the position of the United States, which owns and administers the affected lands, that there is no such inherent inconsistency. That position is entitled to considerable deference by the courts.

The Tribe's property rights in the forest lands of course have been extinguished.[8] Further, the 1905 Act explicitly makes the lands in question "subject to the laws, rules and regulations governing forest reserves" (33 Stat. 1070). It therefore is clear that "Congress intended the lands to be federally *managed* as part of the existing Uintah Forest Reserve" (Pet. App. 29a (Seymour, J., concurring) (emphasis in original)). Accordingly, the Ashley and Uinta National Forests have been and will continue to be managed for public use pursuant to the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.;* the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1601 *et seq.*; and the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*[9] These statutes preempt tribal jurisdiction at least to the same extent that they preempt state jurisdiction (compare 16 U.S.C. 480), and the proceeds of timber sales will continue to be shared with the State, not the Tribe, pursuant to 16 U.S.C. 500. For this reason, and because the forest lands are essentially uninhabited, "Indian tribal jurisdiction over the forest reserve will permit the Tribe to govern its members [to the extent consistent with federal law], but will not greatly affect non-Indians" (Pet. App. 27a (Seymour, J., concurring)). The Indian reservation status of the forest lands therefore is of little practical importance, and petitioners do not contend otherwise. See Pet. 28-29.

C. *Uncompahgre Reservation.* 1. On the surface, the court of appeals' holding that the Uncompahgre Reserva-

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[8] See page 16, *supra*; *Chippewa Indians* v. *United States*, 305 U.S. 479, 481-483 (1939); *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir. 1976); *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975).

[9] Several hundred thousand acres of the lands in the Ashley National Forest also lie within the High Uinta Wilderness, a component of the National Wilderness Preservation System designated by the Utah Wilderness Act of 1984, Pub. L. No. 98-428, 98 Stat. 1657 *et seq.* See 16 U.S.C. (Supp. II) 1132 note. Those lands are managed pursuant to the Wilderness Act, 16 U.S.C. (& Supp. II) 1131 *et seq.*

tion was not disestablished in 1897 also appears to rest on a plausible application of *Solem*. Thus, although the 1894 Act provided that unallotted lands on the Uncompahgre Reservation were to be "restored to the public domain" (§ 20, 28 Stat. 337), a reference to the "public domain" is not necessarily dispositive under *Solem* (see pages 10-11, *supra*) and that language was not in any event carried forward in the 1897 Act (30 Stat. 87). Of course, as the district court concluded (Pet. App. 182a), the unlimited provision in the 1897 Act for the opening of surplus lands under "all the land laws of the United States" might be viewed as the functional equivalent of the prior language that would have "restored [the land] to the public domain"; but it was not unreasonable for the court of appeals to conclude that the 1897 Act did not contain explicit language of "cession" or reflect a "present and total surrender of Indian interests" (*Solem*, 465 U.S. at 470). See Pet. App. 11a-12a; *id.* at 18a-19a (Seymour, J., concurring). Furthermore, some of the circumstances underlying the passage of the 1897 Act that were relied upon by the court below—*e.g.*, the absence of a cession agreement with the Uncompahgres, the lack of compensation to them, and the failure of non-Indians to flood into the area (*id.* at 9a, 12a-13a; *id.* at 19a-25a (Seymour, J., concurring))—might in another setting require a finding that the reservation was not diminished.

In the end, however, the court of appeals' analysis is unconvincing. In our view, the circumstances of the Uncompahgre Reservation contrast with those of the Uintah Reservation and "reveal a widely held, contemporaneous understanding" that the Reservation would be disestablished by the 1897 Act (*Solem*, 465 U.S. at 471). We therefore adhere to the view expressed in our memorandum in oppositoin to the Tribe's motion to intervene in *Andrus* v. *Utah*, 446 U.S. 500 (1980), discussed by petitioners (Pet. 8 & n.18, 9-10 & n.22, 24-25), that the Uncompahgre Reservation was disestablished in 1897.

As the majority below acknowledged (Pet. App. 20a-21a (Seymour, J., concurring)), the absence of a cession

agreement pertaining specifically to the Uncompahgre Reservation and Congress's failure to compensate the Uncompahgres for the disposition of surplus land to settlers reflect the view that the Uncompahgres, unlike the Uintahs, had only temporary permission to occupy the Reservation until allotments were made to individual members. See also *id.* at 170a-171a & n.89, 182a-183a. That premise undermines the notion that the Uncompahgres had a tribal interest in the Reservation that survived allotment. Moreover, Congress's actions with respect to the Uncompahgre Reservation in fact *were* based on a cession: in the 1880 agreement, the Uncompahgres ceded all of their tribal interests in the Colorado reservation and agreed to accept allotments at a new location (§ 1, 21 Stat. 200). The conclusion that the 1897 Act disestablished the temporary reservation that was set apart to assure the availability of land for those allotments therefore implements the understanding that the Uncompahgres had already given up their claim to a permanent tribal reservation in 1880.

Similarly, the fact that non-Indians did not flood into the Uncompahgre Reservation after opening does not suggest that the area retained an Indian character. The barren lands within the original Reservation have at all times been essentially uninhabited by Indians as well as non-Indians. Indeed, Congress in 1897 authorized allotments to be made to Uncompahgres on the Uintah Reservation because it recognized that the Uncompahgre Reservation did not contain sufficient land of a suitable quality to serve as a permanent home for all of the Uncompahgres. And in fact only 83 allotments were made to Uncompahgres on the latter Reservation, as contrasted with 584 such allotments on the Uintah Reservation. See page 2, *supra*. We do not believe that Congress intended that the Uncompahgres nevertheless would retain a tribal interest in the Reservation after the vast majority of the Uncompahgres left. Cf. *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 358 (1941).

Other factors reinforce this conclusion, including: (i) Congress's 1899 authorization of 83 allotments on the

"former Uncompahgre Indian Reservation" in order to resolve doubts about the validity of such allotments after the April 1, 1898 deadline for opening the Reservation; (ii) Congress's 1948 extension of the Uintah and Ouray Reservation into an area that the 1948 Act referred to as the "former Uncompahgre Indian Reservation" (§ 2, 62 Stat. 77), an unnecessary act if the latter Reservation continued in existence[10]; and (iii) the absence of any acknowledgment by Congress or the Department of the Interior since 1898 that the Uncompahgre Reservation still exists (Pet. App. 182a-186a).

2. Although the court of appeals erred in holding that the Uncompahgre Reservation was not disestablished, we do not believe that review by this Court is warranted. There is no conflict with any state court decision, and the reservation status of the lands is of little practical importance because they are primarily owned by the United States and are largely uninhabited.

Petitioners assert (Reply Br. 4-5), however, that all current federal permits for grazing in the area must be cancelled if the Uncompahgre Reservation has not been disestablished, because the Taylor Grazing Act provides that grazing districts may not be established "in * * * Indian reservations" (43 U.S.C. 315). We disagree, for three reasons. First, the 1948 Act extending the Uintah and Ouray Reservation into the former Uncompahgre Reservation expressly protects the rights of "grazing-district permittees" (§ 1, 62 Stat. 77; see H.R. Rep. 1372, 80th Cong., 2d Sess. 2, 4 (1948)); that specific statute must control over any general exception in the Taylor Grazing Act. Second, the Taylor Grazing Act was passed in 1934, at a time when the term "reservation" might have been thought to refer only to Indian trust lands (see *Solem*, 465 U.S. at 468); the exception in 43 U.S.C. 315 therefore need not be construed to apply to *public*

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[10] The majority of the en banc court of appeals acknowledged that this 1948 extension "seems irreconcilable with continued reservation status" of the original Uncompahgre Reservation (Pet. App. 25a (Seymour, J., concurring)).

lands within the boundaries of an Indian reservation, especially where, as here, virtually no trust land remains.[11] Third, in the Federal Land Policy and Management Act of 1976, 43 U.S.C. (& Supp. II) 1701 *et seq.*, Congress provided for the issuance of permits for grazing on "public lands," a term defined as "any land * * * owned by the United States * * * and administered by * * * the Bureau of Land Management, * * * except * * * lands held for the benefit of Indians" (43 U.S.C. 1702(e)). Because the public lands within the original Uncompahgre Reservation are not held for the benefit of the Ute Tribe, they are available for grazing under 43 U.S.C. 1752.[12]

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[11] We have been informed by the Department of the Interior that it has issued grazing permits on the Zia Indian Pueblo in New Mexico, which also contains public lands.

[12] For similar reasons, the decision below will not affect mining interests on the public lands in the area. In addition, for the reasons stated in our memorandum (at 6-7) in *Andrus* v. *Utah*, *supra*, the reservation status of the land for jurisdictional purposes does not have any effect on the ownership by the State of school sections or other lands within the original Uncompahgre Reservation. There is no anomaly in the presence of state-owned lands in an Indian Reservation (see *National Farmers Union Ins. Co.* v. *Crow Tribe*, No. 84-320 (June 3, 1985), slip op. 1), and in fact Congress recognized in 1948 that the Hill Creek Extension contained approximately 34,000 acres of state-owned land, as well as 3,338 acres of private and county lands. See H.R. Rep. 1372, *supra*, at 2.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, because the United States did not take a position in the court of appeals regarding the status of the original Uncompahgre Reservation, the Court may wish to grant the petition, vacate the judgment below, and remand for further consideration of that issue in light of the views expressed herein.

Respectfully submitted.

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